(19)

No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certioari To
The Oregon Supreme Court

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF FLORENCE DOLAN

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Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of Florence Dolan.[1]

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (MSLF) is a nonprofit, public interest law foundation organized pursuant

[1] *Amici* have obtained the written consents of the parties. These written consents have been provided to the Clerk of the Court.

to the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, a limited and accountable government, and the free enterprise system.

The Alliance for America is a fifty state network of nearly five hundred independent grassroots organizations whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee (FLOC) is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* believe that the ruling of the Oregon Supreme Court does violence to the precedent decisions of this

Court which recognize the constitutional vitality of private property rights.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici curiae hereby adopt Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

Amici acknowledge that Petitioner does not challenge Respondent's land use regulations generally. Petitioner does, however, challenge the exactions demanded of her by Respondent as a condition to receiving a development permit for her property.

The Oregon Supreme Court erred in dismissing Petitioner's claims under the Fifth and Fourteenth Amendments to the United States Constitution for the taking of her property and the violation of her due process rights. Further, the decision of the Oregon Supreme Court is in direct conflict with decisions of this Court with respect to three important federal questions concerning the extent to which persons acting under color of law may interfere with, impair, or take property rights.

This Court should not allow Respondent, and other governmental bodies, to avoid their mandatory duty to compensate landowners whose property is put to public use. Indeed, it is only of recent vintage (and in the face of

dwindling public fiscs) that governmental bodies have sought, in the name of environmental protection, to circumvent their eminent domain powers without regard to the property owners' Fifth Amendment rights, and take an individual's property via confiscatory actions, such as the action present in this case.

ARGUMENT

A. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Ousts An Owner From Her Property In A Way Customarily Achieved Through Eminent Domain Proceedings.

This Court has established, as a basic tenet of land use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property, and the right to evidence such exclusive ownership and possession by excluding others from one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies or persons acting under color of law deprive a property owner of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id.*

Contrary to the clear and unambiguous decisions of this Court, the Oregon Supreme Court has determined that, by simply applying for a development permit and

by seeking the "benefit" of the permit process, Petitioner has, as a matter of law, waived her constitutionally-protected property rights. Moreover, in its decision, the Oregon Supreme Court established, as a rule of law, that a land use regulation which requires a property owner to submit to the continued physical occupation of his or her property, as a condition to obtaining a land use permit, does not result in the taking of the owner's property or the deprivation of the owner's fundamental right to absolute and exclusive ownership and possession of the property. The decision of the Oregon Supreme Court does such violence to settled law, as expressed in the precedent decisions of this Court, that it must be reversed.

1. The Act Of Applying For A Land Use Permit Does Not, In And Of Itself, Require Petitioner To Surrender To Respondent Her Constitutionally-Protected Right To Exclude Others From Her Property.

According to the hypothesis advanced by the Oregon Supreme Court, property owners must be prepared to surrender their property rights for the privilege of seeking a land use permit. As the Orego Supreme Court held: "Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit." Petitioner's App. A-11 n.8.

Contrary to the holding of the Oregon Supreme Court, this Court has ruled that the submission of a permit application does not, as a matter of law, constitute a waiver, by the property owner, of her important and

fundamental property rights. The "voluntary relinquishment" theory advocated by Respondent, and upon which the Oregon Supreme Court erroneously based its decision, was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In response to Teleprompter's suggestion that the law requiring residential landlords to submit to cable installations was "simply a permissible regulation of the use of real property," *id.* at 438, this Court held that the right of a property owner to make otherwise-lawfully use of his or her property "may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land may not be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

The Oregon Supreme Court advances what might be characterized as an "additive" theory of land use regulation, that is, that government "adds to" property rights by granting permits to property owners for development of their property. However, the proposition that an applicant for a land use permit is seeking a "benefit" from the government, and that, as a condition of conferring such a benefit, the government can thus exact from the applicant any concession which the government deems to be in the public interest, was expressly rejected by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). In *Nollan*, this Court stated:

> [T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as [a] voluntary "exchange."

Nollan, 483 U.S. at 833 n.2.

In ruling as it did, the Oregon Supreme Court undertook an extensive analysis of this Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). However, *Yee* is clearly distinguishable and further, is not applicable to the facts of this case.[2] This Court, in reaching the conclusions which distinguish *Yee* from *Loretto* and *Nollan*, relied upon the fact that, by engaging in the mobile home rental business, the Yees were presumed to have voluntarily submitted themselves to the reasonable regulation of the mobile home rental business, including the rent control provisions of the Mobile Home Residency Law. However, in so ruling, this Court observed that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner, over objection, to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 112 S.Ct. at 1528. That is the instant case. Yet, the Oregon Supreme Court has adopted

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[2] The Oregon Supreme Court declined to distinguish the facts of this case from *Loretto* and *Nollan*, and chose instead to base its analysis on *Yee v. City of Escondido*. *Yee*, however, is readily distinguishable from this case on its facts; the Yees *chose* to engage in the mobile home park rental business and, therefore, became subject to the reasonable regulation of that business by the City of Escondido. Petitioner has no more elected to engage in the pedestrian and bicycle recreational business than Mrs. Loretto was in the television business, or the Nollans were in the business of providing accommodations to beach walkers.

a construction of *Yee* that deprives all meaning and vitality from this Court's *Loretto* decision governing *per se* takings for permanent physical occupations of private property.

Amici acknowledge the authority of Respondent to regulate the use and development of Petitioner's property under the provisions of state and local land use laws. However, Respondent and the Oregon Supreme Court "go too far" when they allow the taking of Petitioner's fundamental property rights in the guise of a land use permitting scheme. This Court cannot let stand a decision by a state supreme court which grants to permitting authorities a license to demand the surrender of fundamental property rights whenever the property owner has the misfortune to fall within the jurisdiction of the multitude of federal, state and local permitting programs.

The conflict between the decision of the Oregon Supreme Court and the clear statements of constitutional law expressed by the decisions of this Court, underscores the need for this Court to restate and to clarify the protection which it has previously afforded to the fundamental rights of property owners in the land use permitting process. If the decision of the Oregon Supreme Court is allowed to stand, there may as well appear over the doorways of the offices of zoning administrators and land use regulators throughout the country:

Lasciate ogni speranza, voi ch' entrate[3]

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[3] "All hope abandon, ye who enter in." Dante: *The Divine Comedy, "Inferno"* III. ix.

2. Respondent's Deprivation Of Petitioner's Right To Exclude Others From Petitioner's Property Is A Taking By Respondent Of Petitioner's Fundamental Property Rights And Gives Rise To Both A Substantive Due Process Claim And A Taking Claim Under The Fifth And Fourteenth Amendments Of The Constitution.

The decision of the Oregon Supreme Court is in direct conflict with the recent decisions of this Court. This Court's decisions confirm that the right to exclude others from one's property is a right so fundamental to our notion of private property that any interference with that right by government, or by persons acting under color of state law, is a taking, regardless of the degree of the interference, the economic effect of the interference, the extent of other rights retained by the property owner, or the benefits which might be derived by the public as a result of such interference.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court emphasized that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35 (footnote and citation omitted).

Although in *Loretto*, this Court recognized the "broad power [of the States] to regulate housing conditions in general and the landlord-tenant relationship in particular," *Loretto*, 458 U.S. at 440, the Court also recognized the distinction between rent control cases (such as *Yee*) and physical occupation cases. "In none of [the housing regulation] cases however, did the government *authorize the permanent occupation of the landlord's property by a third party.*" *Id.* at 440 (emphasis added).

Equally compelling and even more relevant to Petitioner's position is *Nollan*, in which this Court stated:

> [t]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property by the government, itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. (Citations omitted.)

Nollan, 483 U.S. at 831-32.

This Court, in *Nollan*, reaffirmed its rationale in *Loretto* by stating "our cases universally have found a

taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*" *Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35) (emphasis added). One need only compare the limited extent of the "physical invasions" held to be a sufficiently intrusive infringement upon the fundamental rights of the property owners in *Loretto* and *Nollan* with the forced occupation of a significant part of Petitioner's property by the City's bicycle and pedestrian pathway, to conclude that a significantly greater invasion of Petitioner's property has occurred than the Court found to be constitutionally offensive in *Loretto* and *Nollan*.[4]

In this case, the Oregon Supreme Court has decided an important federal question of fundamental property rights in clear conflict with the applicable decisions of this Court.[5] *Amici* strongly believe that it is important,

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[4] The right to exclude "others" from one's property is not limited to television cable or beach walkers. In *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that it was constitutionally permissible to prevent the plaintiffs from shooting endangered grizzly bears which had been killing plaintiffs' sheep. *Id.* at 1331. Nevertheless, the Court recognized that regulations were within constitutional limits because they "do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears." *Id.*, including the fencing of the property to exclude the bears. Justice White, in his dissent to the Court's denial of *certiorari* in *Christy v. Lujan*, 490 U.S. 1114 (1989), observed that "perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115.

[5] The Oregon Supreme Court held that the exactions were permissible based upon a "reasonable" nexus theory and not

both to protect the rights of Petitioner and to secure the fundamental rights of all property owners from unwarranted incursions by government regulatory agencies, that this Court settle the questions raised by Petitioner. This Court's decisions in *Loretto* and *Nollan* clearly establish that it is the *fact* of the forced permanent physical invasion, not the *degree* of the invasion or the identity of the interlopers which is the determining factor. The decision of the Oregon Supreme Court is inconsistent and irreconcilable with the principles of fundamental property rights established by this Court in *Loretto* and *Nollan*. If allowed to stand, the decision of the Oregon Supreme Court will cast tremendous doubt upon the soundness of this Court's decisions.

B. The Transfer Of Rights In Petitioner's Property Does Not Substantially Advance A Legitimate Governmental Interest And Thus Constitutes A Taking.

A statute takes property if it does not *substantially* advance legitimate state interests. *Nollan*, 483 U.S. 825, 834 n.3 (1987). *Nollan* held that California's imposition of an easement upon the Nollan's property had little connection with the justifications advanced for the exaction. Without adequate ends and means, this Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." *Id.* at 837.

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this Court's "substantial" nexus requirement. The Oregon Supreme Court stated that the Respondent's findings justified the greenway exaction by determining that additional storm water runoff, resulting not only from Petitioner's development, but also from "elsewhere within the Fanno Creek drainage basin, is *expected* to increase flow within the creek." The findings also purportedly justified the pedestrian and bicycle pathway dedications because they were "*reasonably related* to the applicant's request to intensify development of this site" because it was "*reasonable to assume* that customers and employees of the future uses of this property *could* utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Petitioner's App. A-24.

Amici believe that this case strongly illustrates the dangers of allowing lower courts to relax the constitutionally required standard governing the degree of scrutiny in takings and exactions cases. The Oregon Supreme Court's decision unconstitutionally permits cities to extort public improvements, planned and codified in master plans, by exacting those improvements from landowners who seek to develop their properties, merely because their properties are in proximity to the sites planned for improvement. This amounts to nothing less than calculated extortion.[6]

In *Nollan*, this Court stressed that the nexus requirement is more stringent than its counterpart under the

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[6] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is "designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole," (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

Equal Protection Clause. *Id.* at 835 n.3. More is required than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . [o]ur cases describe the condition for abridgment of property rights through the police power as to a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Respondent's permit exaction cannot pass constitutional muster.[7] Evidence of an exaction substantially furthering a legitimate governmental interest must be reasonable in nature, credible, and of solid value. As dissenting Oregon Supreme Court Justice Peterson suggested, "[i]f in fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

Further, Justice Peterson, in his dissenting opinion, described the inadequacy of Respondent's findings. As an example, Justice Peterson described the justification of the dedication for the greenway and storm drainage: "[A]ll these findings establish is that there will be some

[7] The insistence upon a nexus between the end sought and the means used is a variant of the harms test. Not having caused the harm, Mrs. Dolan is now asked to underwrite alleged problems which are not a consequence of her conduct. *See Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

increase in the amount of storm water runoff from the site. A thimbleful? The Constitution requires more than that." (Peterson, J., dissenting). Petitioner's App. A-26. Given the undisputed fact that Respondent prepared no site specific studies to substantiate its findings, the Oregon Supreme Court is simply licensing extortionate behavior which enables Respondent to obtain its true public goals: (1) obtaining a greenway to further the objectives of the *Master Drainage Plan* and; (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from other additional development projects in the drainage basin.

The argument propounded by the City of Tigard, in support of its case, amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions.[8] If that were the law, there would be no point in pretending to have a constitutional protection against irrational and arbitrary laws, for there

[8] As Jeremy Bentham put it:

> In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be dissolved in one undistinguishable mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends. . . .

The Works of Jeremy Bentham, ed. John Bowring (Edinburgh, 1843), VII, 456.

is no possible enactment that cannot be *somehow* argued to support some legitimate purpose, if the logic of that argument is deemed to be entirely immune from any judicial scrutiny. *Amici* urge this Court to require government to make specific findings that substantially and proportionately support, in both character and degree, any exactions imposed as a result of adverse impacts created by the use of private property. The Constitution requires no less.

In short, whereas the California Coastal Commission in *Nollan* was properly characterized by this Court as engaging in an "out-and-out plan of extortion," by demanding that the owners provide a public easement as a condition for rebuilding their home, *Nollan* at 837, the City of Tigard, in this case, has brazenly gone much further and engaged in what could be aptly called an out-and-out plan of confiscation.

C. By Requiring A Significant Area Of Petitioner's Property To Be Left As A Public Open Space And Recreational Area As A Condition Precedent To Permitting The Development Of Any Other Portion Of Petitioner's Property, Respondent Has Denied Petitioner All Productive Or Economic Use Of That Portion Of Her Property, Without Compensation.

While there remains some question as to the economic effect of the development limitations imposed by Respondent on the "other areas" of Petitioner's property, the decision of the Oregon Supreme Court leaves no doubt that, in its view, Petitioner can be compelled by Respondent to dedicate her property to a public purpose

as a condition of development of any other area of Petitioner's property. Accordingly, it would appear, under the reasoning of this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798 (1992), that Respondent has, under color of state law, taken all beneficial use of the exacted portion of Petitioner's property.

This Court's pronouncement in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central*, 438 U.S. 104, 130 (1978), must be reexamined in light of this Court's decision in *Lucas*. There is a compelling need for this Court to determine the extent to which a taking has occurred when government action deprives a property owner of all value of a portion of his or her property.

In *Lucas*, the Court noted that the issue of whether a taking has occurred, with respect to the parcel as a whole or the burdened portion of the parcel, was unsettled and that it was unclear "whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 813 n.7. The Court recognized:

> the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of

> value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.

Id.

The facts in *Lucas* did not afford this Court an opportunity to address the inconsistencies resulting from this Court's formulation in *Penn Central* because, in *Lucas*, the development restriction which required that the land be left in its natural state applied to the entire property. *Id.* at 4883. In this case, however, Respondent's actions prohibit the development of any portion of the Petitioner's property unless a significant area is dedicated for the City's purpose. Thus, under the Court's decision in *Lucas*, Respondent has accomplished a complete taking of that portion of Petitioner's property. It remains to be answered by this Court whether a taking has occurred when a significant portion of Petitioner's property has been left "without economically beneficial or productive options for its use." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 814.

The decision of the Oregon Supreme Court, if allowed to stand, will encourage government agencies to view the dedication of open space on private land, by regulation, as an attractive, practical and inexpensive alternative to "the use of the many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitude on private scenic lands preventing development uses, or to acquire such lands altogether." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 815.

CONCLUSION

Amici respectfully urge this Court to find that the City of Tigard violated the Fifth Amendment to the U.S. Constitution when it exacted Petitioner's private property for public use as a condition of property development. The Constitution requires that a heightened degree of scrutiny be applied to the substance of Respondent's actions in this case.

Respectfully submitted,

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January 13, 1994